

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA
3

4
5 UNITED STATES OF AMERICA,

6 Plaintiff,

7 v.

8 JAMES WARD, et al.,

9 Defendants.
10

NO. CR 11-393 TEH

ORDER REGARDING
RESTITUTION

11 This matter came before the Court on December 3, 2012, for a hearing on the amount
12 of restitution due to the victims of the criminal conspiracy of which Defendants James Ward,
13 Edward Locker, Richard Tipton, and David Lin have been convicted. Having considered the
14 parties' oral and written arguments and the relevant evidence in this case, the Court finds, for
15 the reasons given below, that each Defendant is jointly and severally liable for \$8,628,963.44
16 in restitution.
17

18 **BACKGROUND**

19 Defendants were jointly engaged in a business providing private loans to builders of
20 single-family homes in and around Mountain View, California. The first iteration of
21 Defendants' business venture was Jim Ward & Associates, Inc. ("JWA"). JWA was
22 followed by JSW Financial, Inc. ("JSW"), incorporated in April 2005. After JWA ceased
23 operations in January 2006, JWA's principals continued to operate the same business in the
24 same location as JSW.

25 The first investment products to be offered by JWA were "fractional interest
26 investments." These investments were secured by deeds of trust on real property. JWA, and
27 later JSW, loaned the money in the fractional interest investments to borrowers who were in
28 the business of constructing single-family homes. Each fractional interest investment was

1 made in order to fund, in part, the development of a specific piece of real property. While
2 the development projects were under construction, the fractional investors received interest
3 payments; when a completed project was sold, the investors' principal was returned to them.

4 In the fall of 2002, JWA began to offer a new investment product
5 – Blue Chip Reality Fund, LLC (“Blue Chip”). Unlike the fractional interest investments,
6 Blue Chip was “pooled,” meaning that investor money was not designated for use in a
7 particular construction project, but rather could be used for several different projects. JSW
8 began offering a second pooled investment fund, Shoreline Investment Fund, LLC
9 (“Shoreline”), in the fall of 2006. JSW was the manager of Blue Chip and Shoreline, and it
10 determined the allocation of the pooled investment funds among various construction
11 projects.

12 Beginning no later than September 2005 and continuing through October 2008,
13 Defendants represented to investors in various mailings that their investments in Blue Chip
14 and Shoreline were secured by deeds of trust in the same manner as were investments in the
15 fractional interest investments. In fact, they were not. Defendants made these
16 misrepresentations in order to solicit new investment money and induce investors to keep
17 their money in Blue Chip and Shoreline.

18 Around 2005, JSW began to transfer money from the fractional interest investments
19 into Blue Chip and Shoreline without the investors' consent. As the real estate market
20 crashed, JSW experienced a cash flow crisis, in response to which it increased its
21 unauthorized transfers of fractional investors' money to Blue Chip and Shoreline. JSW also
22 solicited direct, unsecured loans from several individuals.

23 In November 2008, Defendants' bankruptcy counsel informed investors that JSW was
24 out of money, their investments in Blue Chip and Shoreline were unsecured, and it was
25 unlikely that they would recover any of the money they had invested in the funds. Also gone
26 was the money that Defendants had transferred from fractional interest investments into Blue
27 Chip and Shoreline and the money invested in JSW through direct, unsecured loans.

28

1 On June 21, 2011, a federal grand jury returned an indictment charging Defendants
2 with eighteen counts in connection with the misrepresentations they made to Blue Chip and
3 Shoreline investors, including one count of conspiracy to commit mail and wire fraud,
4 seventeen counts of mail fraud, and one count of wire fraud. Defendants Ward, Locker, and
5 Tipton entered into plea agreements, pursuant to which each pled guilty to Count One of the
6 indictment, conspiracy to commit mail and wire fraud. Defendant Lin exercised his right to a
7 jury trial and, on May 15, 2012, the jury returned a verdict convicting him of all eighteen
8 counts. The Court subsequently sentenced Ward, Locker, Tipton, and Lin to terms of
9 imprisonment of 60, 30, 18, and 28 months, respectively.

10 In the sentencing proceedings, the parties agreed to defer the entry of an order on the
11 amount of restitution until a later date, pursuant to 18 U.S.C. § 3664(d)(5). Presently under
12 consideration is the government's request for an order amending Defendants' judgments to
13 specify the amount of restitution.

14 15 **LEGAL STANDARD**

16 It is the government's burden to prove the amount of loss for restitution purposes by a
17 preponderance of the evidence. 18 U.S.C. § 3664(e). The government must also show by a
18 preponderance of the evidence that an individual is a victim of the crime of which the
19 defendant was convicted, and that the victim's losses were caused by the defendant's offense
20 conduct. *United States v. Gossi*, 608 F.3d 574, 579 (9th Cir 2010); *United States v. Peterson*,
21 538 F.3d 1064, 1074-75 (9th Cir. 2008).

22 23 **DISCUSSION**

24 The government recommends that the Court enter a restitution order in the amount of
25 \$32,273,793, encompassing losses to Blue Chip and Shoreline investors (\$8,628,963),
26 fractional investors (\$20,203,505), and direct investors (\$3,441,325). Defendants have
27 agreed to a restitution order of \$8,628,963.44, which represents the losses to individuals who
28 invested in Blue Chip and Shoreline from the inception of the funds through September

2008.¹ They contest the balance of the amount requested by the government, arguing that losses from fractional interest investments and investments in unsecured loans made directly to JWA or JSW were not caused by the conduct of which they were convicted.

The Mandatory Victims Restitution Act (“MVRA”), which governs the restitution determination in this case, requires courts to order restitution to victims of offenses against property “in which an identifiable victim has suffered a physical injury or pecuniary loss.”

18 U.S.C. § 3663A(a)(1) & (c)(1)(B). The MVRA defines a “victim” as:

a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant’s criminal conduct in the course of the scheme, conspiracy, or pattern.

18 U.S.C. § 3663A(a)(2). Under the MVRA, the court must “order restitution to each victim in the full amount of each victim’s losses as determined by the court.” 18 U.S.C. § 3664(f)(1)(A). However, a court need not order restitution if it finds that “determining complex issues of fact related to the cause or amount of the victim’s losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.” 18 U.S.C. § 3663A(c)(3).

In conspiracy cases, “the court can order restitution for damage resulting from any conduct that was part of the conspiracy and not just the specific conduct that met the overt act requirement of the conspiracy conviction.” *United States v. Reed*, 80 F.3d 1419, 1423 (9th Cir. 1996). The restitution order may include compensation to a victim for losses resulting from “acts of related conduct for which [the defendant] was not convicted.” *United States v. Lawrence*, 189 F.3d 838, 848 (9th Cir. 1999). Thus, in a conspiracy case, a restitution order may compensate victims not named in the indictment and be based on uncharged conduct of which the defendant was not convicted. *See United States v. Brock-Davis*, 504 F.3d 991, 999-1000 (9th Cir. 2007).

¹ Defendants initially opposed the inclusion in the restitution order of investments in Blue Chip and Shoreline made prior to September 2005, but at oral argument, they conceded that these investments should be included.

1 Nevertheless, an order of restitution may only compensate victims “for actual losses
2 caused by the defendant’s criminal conduct.” *United States v. Gamma Tech Indus., Inc.*, 265
3 F.3d 917, 926 (9th Cir. 2001). It is not enough to show that but for Defendants’ conduct, the
4 loss would not have occurred; the government must also demonstrate proximate causation.
5 18 U.S.C. § 3663A(a)(2); *see also United States v. Meksian*, 170 F.3d 1260, 1263 (9th Cir.
6 1999). While the Defendant’s criminal conduct need not be the only cause of the loss, “any
7 subsequent action that contributes to the loss, such as an intervening cause, must be directly
8 related to the defendant’s conduct.” *Gamma Tech*, 265 F.3d at 928. An intervening cause
9 that is not directly related to the conduct of which defendants have been convicted may
10 render the causal chain so attenuated that a restitution award becomes unreasonable. *United*
11 *States v. Gordon*, 393 F.3d 1044, 1055 (9th Cir. 2004).

12 With these general principles in mind, the Court examines the government’s request
13 with regard to each of the two disputed categories of investors – fractional investors and
14 direct investors.

15 **A. Fractional investors**

16 The Government argues that Defendants’ conduct caused fractional investors’ losses
17 because Defendants deceived them into believing that JSW was a “healthy, successful
18 business,” thereby inducing them to invest. Gov’t Response at p. 2-3 (Docket No. 174). In
19 support of this theory, the government points to evidence that Defendants purposefully did
20 not inform the fractional investors of the financial instability of the business as a whole, or of
21 the fact that some of the money in fractional interest investments was being directed into
22 Blue Chip and Shoreline. At trial, one investor stated that he would not have placed his
23 money in a fractional interest investment had he known that part of his investment might be
24 diverted into Blue Chip or Shoreline; aside from this testimony, there is no direct evidence
25 that but for Defendants’ criminal conduct, the fractional investors would not have entrusted
26 their money to JWA or JSW. Moreover, the government does not argue that Defendants’
27 failure to affirmatively disclose JSW’s financial instability to the fractional investors was
28 criminal, and it does not point to any specific misrepresentations that Defendants made to

1 investors about the fractional interest investments. The weak nexus between Defendants'
2 criminal conduct and fractional investors' losses does not support a restitution award
3 encompassing the entirety of those losses.

4 The government points out that some of the fractional investors also invested in Blue
5 Chip and Shoreline, and so presumably were exposed to Defendants' misrepresentations
6 about those funds. Even if the Court were to draw the attenuated inference necessary to
7 conclude that misrepresentations about Blue Chip and Shoreline induced investors to place
8 their money in fractional interest investments, the government has not presented evidence
9 that would permit the Court to identify the subset of fractional investors who were exposed to
10 those misrepresentations. It is therefore impossible for the Court, based on the record before
11 it, to determine what proportion of the fractional investors' losses may have been caused by
12 misrepresentations about Blue Chip and Shoreline.²

13 Moreover, the sharp downturn in the real estate market between 2005 and 2008
14 constitutes an intervening cause of fractional investors' losses that is not attributable to
15 Defendants' criminal conduct. It is apparent that some, if not all, of the losses suffered by
16 fractional investors resulted from the market downturn, which caused projects in which the
17 investors held fractional interests to fail. Because fractional interest investments – in contrast
18 to investments in Blue Chip and Shoreline – were secured in the manner Defendants
19 represented they were, losses attributable to a decline in investment value as a result of
20 market forces are not properly included in the restitution order. *See Gamma Tech*, 265 F.3d
21 at 927 (collecting cases denying restitution for losses that did not directly result from a
22 defendant's criminal conduct); *cf. Meksian*, 170 F.3d at 1263 (reversing restitution order for
23 loss sustained by lender due to worthlessness of property serving as loan collateral in loan-

24 ² The government also points to evidence that Defendants transferred money to Blue
25 Chip and Shoreline from the fractional interest investments, and that they did not inform the
26 fractional investors of these transactions. Losses resulting from these unauthorized transfers
27 are attributable to Defendants' conduct as part of the conspiracy. But the Government
28 represents that it has no practical method of determining which fractional investors lost
money as a result of the unauthorized transfer of funds to Blue Chip and Shoreline. It
therefore does not seek restitution for these losses separately from the losses attributable to
fractional interest investments generally. Gov't Response at p. 6 (Docket No. 174).

1 application fraud case); *Brock-Davis*, 504 F.3d at 1002 (reversing order of restitution for lost
2 rental of hotel room during “slow winter season”). In *United States v. Berger*, the court
3 upheld a restitution award based on the district court’s reasonable attribution of a portion of
4 victims’ losses to a downturn in the electronics market. 473 F.3d 1080 (9th Cir. 2007).
5 Here, however, there is no evidence in the record that would permit the Court to make a
6 reasonable determination of the proportion of fractional investors’ losses that is attributable
7 to the downturn in the real estate market as opposed to Defendants’ criminal conduct.

8 At best, the evidence before the Court suggests that some, but not all of the fractional
9 investors made their investments as a result of Defendants’ criminal conduct, and that some,
10 but not all of their losses are attributable to Defendants’ criminal conduct. To adopt the
11 government’s recommendation, the Court would have to infer from this evidence that the
12 entirety of fractional investors’ losses was directly and proximately caused by Defendants’
13 criminal conduct in the course of the conspiracy. The evidence before the Court does not
14 support that inference.

15 **B. Direct lenders**

16 The government’s restitution request also includes \$3,441,325 lost as a result of
17 direct, unsecured loans made to JWA and JSW by four investors, identified as JA (\$841,710),
18 SA and FA (a family) (\$115,159), EB (\$2,113, 260), and BS (\$371,196). In support of this
19 request, the government points to victim impact statements in which JA, SA and FA, and EB
20 indicated that they felt deceived by Defendants and that the trust they had placed in
21 Defendants had been violated. Gov’t Resp. at 5 (Docket No. 174). In addition, investor JA
22 reported having received monthly statements from Defendants reflecting interest earnings of
23 \$10,000 to \$12,000 per month. *Id.* However, the government does not point to any evidence
24 of specific misrepresentations made by Defendants to these victims which caused them to
25 make unsecured loans to JWA or JSW and it does not argue that the interest income reflected
26 on JA’s account statement constituted a misrepresentation. The investors’ statements that
27 they felt deceived and that their trust had been violated are insufficient to support an
28 inference that Defendants engaged in criminal conduct that induced them to make unsecured

1 loans. The government therefore has not met its burden to show that the losses to investors
2 who made direct, unsecured loans resulted from Defendants' criminal conduct.

3 **C. Alternative restitution request**

4 The government requests that if the Court disagrees with its reasons for requesting
5 restitution on behalf of fractional investors and direct investors, a restitution order be entered
6 in the amount of \$8,628,963.44, the sum to which the government and Defendants have
7 agreed. This amount is lower than the amount of loss calculated for Guidelines purposes
8 because it excludes funds transferred from the fractional interest investments into Blue Chip
9 and Shoreline. The government states that it has "no practical method" of discerning the
10 amount of restitution that would be due to individuals belonging to this subset of fractional
11 investors without the investment of additional resources which "would unduly prolong and
12 complicate the sentencing process." Gov't Response at p. 6 (Docket No. 174). On this basis,
13 the Court finds that determining complex issues of fact related to the cause or amount of the
14 victim's losses would complicate or prolong the sentencing process to a degree that the need
15 to provide restitution to any victim is outweighed by the burden on the sentencing process.
16 See 18 U.S.C. § 3663A(c)(3). Accordingly, the restitution order will be entered in the
17 amount of \$8,628,963.44.

18 19 **CONCLUSION**

20 For the foregoing reasons, Defendants' judgments of conviction shall be amended to
21 reflect that each Defendant is jointly and severally liable to the victims of the conspiracy for
22 **\$8,628,963.44**. Each amended judgment is to specify that the Defendants shall pay the
23 restitution to the persons named, and the amounts set forth, in a document entitled "*United*
24 *States v. Ward, et al.*, CR-12-0393 TEH; Restitution Schedule," to be incorporated by
25 reference into the judgment in each Defendant's case. The Government shall submit this
26 document to the Probation Office, to be placed on file with the Clerk of Court for use in
27 processing restitution payments.
28

United States District Court

For the Northern District of California

1 **IT IS SO ORDERED.**

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3 Dated: 01/03/2012



THELTON E. HENDERSON, JUDGE
UNITED STATES DISTRICT COURT